Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sealtite Building Fasteners

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Serial No. 75162108

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Walter D. Ames for Sealtite Building Fasteners.

Mitchell Front, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

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Before Simms, Bucher and Rogers, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

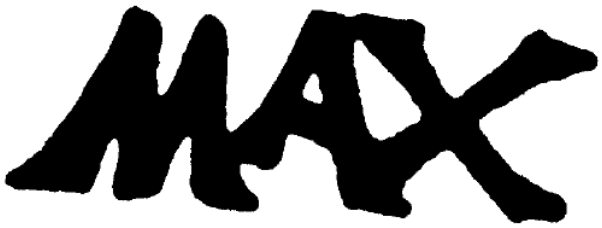
Sealtite Building Fasteners seeks registration on the Principal Register of the mark shown below:

MAXX

for goods identified in the application, as amended, as "self-piercing and self-drilling metal screws for use in

the manufacture of metal and post-frame buildings," in International Class 6.[1]

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles the mark shown below:



registered for goods identified as "metal threaded fasteners," also in International Class 6,[2] as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and applicant have fully briefed the case. Applicant did not request an oral hearing before the Board.

We affirm the refusal to register.

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[1] Application Serial No. 75162108 was filed on September 6, 1996, based upon applicant's allegation of use in commerce at least as early as July 7, 1992.

[2] Registration No. 1756419 issued on March 9, 1993; section 8 affidavit accepted and section 15 affidavit acknowledged; renewed.

In arguing for registrability, applicant contends that, given the nature of the goods, the Trademark Examining Attorney has incorrectly placed a disproportionate emphasis on the phonetic similarity of these marks; that applicant's industry-specific goods are different from the goods of the cited registration and travel in different channels of trade; that applicant's customers are sophisticated purchasers; that MAX-formative marks are not that strong in the field of fasteners; and that applicant is unaware of any instances of actual confusion during more than ten years of contemporaneous usage of these two marks.

By contrast, the Trademark Examining Attorney argues that the involved marks create nearly the same commercial impressions; that the goods are closely related, if not identical products, and would move through the same channels of trade to the same class of consumers; and that applicant's claim that there has been no actual confusion is not meaningful in the context of this *ex parte* dispute.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing upon the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d

1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Accordingly, we turn first to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound and connotation.

As to appearance, as argued by applicant, both marks are displayed in different special formats:

Registrant's mark

Applicant's mark

Applicant characterizes registrant's mark as drawn in "a puerile scrawl" and placed in close proximity to an image of "a whimsical, friendly lion" used on registrant's specimens. Additionally, applicant emphasizes that its mark is a coined, four-letter word made by adding a second letter "X" to the end of the more familiar term, MAX. When placed side by side, as shown above, the addition of the additional letter "X" does create a visual difference.

However, the test to be applied in determining likelihood of confusion is not whether the marks are

distinguishable upon side-by-side comparison, but rather whether the marks, as they are used in connection with the registrant's and applicant's goods, so resemble one another as to be likely to cause confusion. Under actual marketing conditions, consumers do not necessarily have the opportunity to make side-by-side comparisons between marks. *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980). The proper emphasis is thus on the recollection of the average customer, and the correct legal test requires us to consider the fallibility of human memory. The average purchaser normally retains a general rather than a specific impression of trademarks. *See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973) [the figure of a stooped, elderly man holding a cane and the words "G•R•A•N•D•P•A PIDGEON" v. the figure of a seemingly more spry but elderly man in a mark having no wording, both used with retail store services]; *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), affirmed in unpublished opinion, Appeal No. 92-1086 (Fed. Cir. June 5, 1992) ["SILVER SPOON CAFÉ" and "SILVER SPOON BAR & GRILL" for "restaurant and bar services" v. "SPOONS," "SPOONBURGER," "SPOONS with cactus design," and

"SPOONS within a diamond logo design"[3]; *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Accordingly, we find that the difference in stylization between these two marks is not legally significant, and that the only other visual difference between these marks is a single letter coming at the end of otherwise identical words. Given the composition of these two words, applicant's mark is much closer in overall appearance to registrant's mark than applicant would have us conclude.

As noted by the Trademark Examining Attorney, it seems unquestionable that these two marks have identical pronunciations. To the extent consumers might find themselves calling for these goods by speaking the marks, there is no way to distinguish them phonetically.

As to connotation, applicant argues that while its "Maxx" trademark is totally arbitrary, registrant's mark,

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[3] SPOONS and 

"Max," will be perceived as a man's given name, a surname or an abbreviation for the term "maximum." However, even if it is the case that "Max" would be viewed as a name or as a shortened form of the word "maximum," it remains an arbitrary term in this context, and hence a fairly strong mark, for registrant's "metal threaded fasteners."

Having reviewed the similarities in sound, meaning and appearance of these two marks, we conclude that they are quite similar in their overall commercial impressions.

We turn then to the relatedness of the goods as listed in the cited registration and in the instant application. Registrant's goods are listed as "metal threaded fasteners." At the very least, they are closely related to applicant's goods. However, registrant's identification of goods must be read broadly to include all types of metal screws. Specifically, registrant's goods must be construed as including applicant's self-drilling metal screws having a particular application. Under this construction, we must conclude that registrant's goods overlap with applicant's goods despite the limitation of applicant's goods to use in the manufacture of metal and post-frame buildings. Thus, we find that applicant's goods are closely related to registrant's goods, if not identical thereto.

As to the *du Pont* factor focusing on the conditions under which and buyers to whom sales are made, applicant contends that the relevant purchasers for its identified goods would be sophisticated purchasers:

> As applicant's customers are contractors and builders of metal and post-frame buildings, it will be clear that they do not purchase small quantities of screws at their local hardware store. Instead, applicant's customers are purchasers of large quantities of metal fasteners, enough to hold an entire building together. Applicant's customers who make large purchases of screws know applicant well.

(Applicant's appeal brief, p. 9). We note that although applicant's goods have a very particularized purpose, applicant's identification of goods is not explicitly restricted to specific classes of purchasers. Hence, even if applicant's screws would in most instances be marketed to and bought by sophisticated purchasers, the Board must consider that this kind of item could be offered to all normal purchasers of the goods, and that this might well include ordinary consumers needing self-drilling screws available at the local hardware store. Moreover, the fact that contractors would typically be knowledgeable and discriminating consumers who may be expected to exercise greater care in their selection of applicant's products "does not necessarily preclude their mistaking one

trademark for another" or demonstrate that they otherwise would be entirely immune from confusion as to source or sponsorship when highly similar marks are used on related goods. *See* *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Wincharger Corporation v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); and *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

As to the *du Pont* factor focusing on the nature and extent of any actual confusion, applicant asserts that the respective goods have been offered under the involved marks contemporaneously since registrant allegedly adopted its mark in July 1992, and that applicant is not aware of any instances of actual confusion.

However, applicant's lack of knowledge of incidents of actual confusion is not particularly probative on the question of likelihood of confusion. We have not been provided with information regarding the geographic extent of use of the marks or the dollar volume of the advertising of applicant's or registrant's goods during the past decade. In addition, we have not heard from registrant as to whether it is aware of any incidents of actual confusion. Finally, while solid evidence of actual

confusion is the best evidence of likelihood of confusion, any confusion about mutual sponsorship or affiliation is difficult to obtain and would not necessarily be brought to the attention of either applicant or registrant. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ["The lack of evidence of actual confusion carries little weight … especially in an *ex parte* context"]. Accordingly, we find this to be a neutral factor in our balancing of the *du Pont* factors herein.

As to the number and nature of similar marks in use on similar goods, applicant argues that six third-party registrations demonstrate that MAX-formative marks are so common as applied to fasteners that members of the public are conditioned to look to other distinguishing factors to discover the source of the goods, citing to *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). However, the cited *AMF Incorporated* case itself notes that third-party registrations do not establish that the marks shown therein are in use, much less that consumers are so familiar with them that they are able to distinguish among such marks. Furthermore, even weak marks are entitled to protection

against registration by a subsequent user of the same or similar mark for the same or closely related goods or services. *See* *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976). Finally, in the instant case, applicant included copies of these registrations from the Office's TESS records for the first time with its appeal brief. The Trademark Examining Attorney properly objected to the fact that applicant did not timely make these copies of third-party registrations of record under Trademark Rule 2.142(d) (Trademark Examining Attorney's brief, footnote 4 on p. 9). Thus, the Board has not considered the material.[4]

In conclusion, we find that the marks create quite similar overall commercial impressions, that registrant's broad identification must be construed as including applicant's goods, and that applicant has failed to demonstrate that MAX-formative marks are weak in the field of metal fasteners. Accordingly, we find that applicant's mark, when used in connection with the identified goods, so

[4] We hasten to add that even if the third-party registrations had been considered, it would not demonstrate any weakness of the term MAX alone for metal fasteners, nor change our decision herein. Marks that convey quite different commercial impressions than registrant's and applicant's marks (e.g., CHERRYMAX, MAXI-BIN, MAXICOIL, MAXIHEAD, etc.), can hardly be the basis for concluding that the cited mark is a weak trademark.

resembles registrant's mark as to be likely to cause confusion, to cause mistake or to deceive.

Decision: The refusal to register based upon Section 2(d) of the Trademark Act is hereby affirmed.